

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

DAVID R. LINFOOT,  
Plaintiff,  
vs. No. 03:12-cv-00799-HU

EDWARD P. BERNARDI and JESSE NEAL  
SPENCER, individually and *dba*  
BERNARDI & SPENCER; and OREGON  
COLLECTIONS, INC., an Oregon  
corporation;  
Defendants.

**FINDINGS AND RECOMMENDATION  
ON MOTION FOR SUMMARY JUDGMENT**

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David R. Linfoot  
2014 NE 53rd Avenue  
Portland, OR 97213

Plaintiff *pro se*

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Attorneys for Defendants

1 HUBEL, United States Magistrate Judge:

2       *Pro se* plaintiff David R. Linfoot brings this action against  
3 the defendants Edward P. Bernardi and Jesse Neal Spencer,  
4 individually and doing business as Bernardi & Spencer; and Oregon  
5 Collections, Inc. ("OCI"); alleging the defendants violated his  
6 rights under the federal Fair Debt Collection Practices Act  
7 ("FDCPA") and the Oregon Unlawful Debt Collection Practices Act  
8 ("OUDCPA"), in connection with a default judgment the defendants  
9 obtained in 2007, and their subsequent efforts to execute on the  
10 judgment. Linfoot "seeks an order barring further prosecution of  
11 the State Court action," a declaratory judgment that the state  
12 judgment is "void and unenforceable" because it was obtained  
13 fraudulently, damages for violation of the FDCPA and OUDCPA,  
14 punitive and exemplary damages for "egregiously insidious" conduct,  
15 and damages for intentional infliction of emotional distress. Dkt.  
16 #2, Complaint.

17       The matter currently before the court is the defendants'  
18 motion for summary judgment. Dkt. #14; see Dkt. #15 - Memorandum,  
19 and Dkt. #16, Declaration of Jesse Neal Spencer & Exhibits.  
20 Linfoot has responded to the motion, Dkt. #21, and the defendants  
21 have replied, Dkt. #22. The defendants requested oral argument;  
22 however, the court finds oral argument would not assist the court  
23 in ruling on the motion. The undersigned submits the following  
24 Findings and Recommendation for disposition of the case pursuant to  
25 28 U.S.C. § 636(b)(1)(B).

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2 - FINDINGS AND RECOMMENDATION

### SUMMARY JUDGMENT STANDARDS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In considering a motion for summary judgment, the court "must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996)).

The Ninth Circuit Court of Appeals has described "the shifting burden of proof governing motions for summary judgment" as follows:

The moving party initially bears the burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *Id.* at 325, 106 S. Ct. 2548. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. *Id.* at 324, 106 S. Ct. 2548. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 528 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be

1 drawn in its favor. *Id.* at 255, 106 S. Ct.  
2 2505.

3 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th  
4 Cir. 2010).

5  
6 **BACKGROUND FACTS**

7 The individual defendants Edward P. Bernardi and Jesse Neal  
8 Spencer are Oregon attorneys, and general partners in the law firm  
9 of Bernardi & Spencer. Dkt. #13, Answer, ¶ 10. OCI is an Oregon  
10 corporation, of which Messrs. Bernardi and Spencer are shareholders  
11 and officers. *Id.*, ¶¶ 7-9. This case arises from the defendants'  
12 actions in *Oregon Collections, Inc. v. Linfoot*, No. 0702-01571,  
13 filed in the spring of 2007, in the Circuit Court for Multnomah  
14 County, Oregon (the "State Case").

15 In his Complaint, Linfoot alleges OCI is a "false front"  
16 operated by Bernardi & Spencer, for purposes of adding "an air of  
17 legitimacy to [their] improper and illegal collection activi-  
18 ties[.]" *Id.*, ¶ 16. Linfoot claims OCI frequently initiates  
19 litigation to collect debts from consumers without first making any  
20 bona fide effort to collect the debts. *Id.*, ¶ 17. He also alleges  
21 OCI engages in "unscrupulous and illegal collection tactics,"  
22 including, *inter alia*, failing to verify debts upon request, and  
23 the commission of "fraud upon the courts." *Id.*, ¶ 18.

24 Linfoot claims that "[o]n or about March 25, 2007," he became  
25 aware the defendants were attempting to collect an alleged debt  
26 from him, on behalf of a third party. Dkt. #2, ¶ 19. He claims he  
27 sent the defendants correspondence on March 28, 2007, requesting  
28 validation of the alleged debt. *Id.*, ¶ 20; see *id.*, Ex. 1. He

1 alleges the defendants never validated the debt as required by law,  
2 and instead, Bernardi & Spencer, acting as attorneys for OCI,  
3 initiated the State Case against him. *Id.*, ¶ 23. Linfoot  
4 maintains he was never properly served with process in the State  
5 Case, but the defendants fraudulently claimed he had been properly  
6 served. *Id.*, ¶ 24.

7       When Linfoot failed to appear in the State Case, Bernardi &  
8 Spencer obtained a General Judgment of Default against Linfoot on  
9 OCI's behalf, which judgment was entered on July 2, 2007. *Id.*  
10 Linfoot subsequently filed for protection under Chapter 13 of the  
11 Bankruptcy Code. In his bankruptcy schedules, filed in the Bank-  
12 ruptcy Court on November 24, 2009, Linfoot listed the judgment lien  
13 created by the judgment in the State Case on his list of secured  
14 creditors. See Dkt. #16-2. He also included the judgment lien in  
15 his Chapter 13 Plan. See Dkt. #16-3. The Bankruptcy Court's  
16 records reflect that Linfoot's Chapter 13 Plan was confirmed on  
17 January 8, 2010. Paragraph 12 of the Plan required Linfoot "to  
18 either obtain a reverse mortgage on his personal residence or sell  
19 the residence by March 31, 2011." When Linfoot failed "to even  
20 begin the process of obtaining a reverse mortgage or of listing the  
21 property for sale," the Trustee filed a "Motion to Dismiss for  
22 Failure to Comply with the Terms of the Plan" on August 15, 2011.  
23 Dkt. #35 in Case No. 09-38673-elp13 (Bankr. D. Or.). After notice  
24 to Linfoot and a hearing, the Trustee's motion was granted and the  
25 case was dismissed on November 3, 2011. Dkt. #41 in the Bankruptcy  
26 case.

27       On March 14, 2012, Linfoot filed a motion in the State Case,  
28 seeking to set aside the default judgment entered against him in

1 2007. In the motion, Linfoot claimed he was never served properly  
2 in the case; he was unaware he had even been sued in the case; and  
3 he got no notice from the court that the judgment had been entered  
4 against him. Dkt. #16-4, ¶¶ 2-4. Linfoot claimed he only became  
5 aware of the judgment against him "in November of 2011, when [he]  
6 became aware [OCI] had filed a Motion for an order authorizing a  
7 sheriff's sale of [his] homestead property."<sup>1</sup> *Id.*, ¶ 2. On May 9,  
8 2012, the State Court entered a summary order denying Linfoot's  
9 motion to set aside the default judgment. Dkt. #16-5. On May 18,  
10 2012, OCI obtained an Order from the State court, over Linfoot's  
11 written objections, authorizing levy and sale of Linfoot's interest  
12 in his residential property. Dkt. #16-8; see Dkt. #16-7, Linfoot's  
13 "Response and Objections" to OCI's motion for an order authorizing  
14 the sale.

15 Linfoot filed the present action on May 4, 2012. The  
16 defendants argue the case is barred by the applicable statutes of  
17 limitations, and by the doctrines of claim preclusion and issue  
18 preclusion.<sup>2</sup> Dkt. #15. Linfoot advances procedural challenges to  
19 the defendants' motion, which I will address first. He claims the  
20 defendants' motion is, in effect, a motion for judgment on the  
21 pleadings pursuant to Federal Rule of Civil Procedure 12(c). He  
22 notes Rule 12(c) allows a motion for judgment on the pleadings only  
23 "[a]fter the pleadings are closed." Because he had not yet  
24

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25 <sup>1</sup>This allegation obviously is belied by Linfoot's listing of  
26 the judgment in his bankruptcy schedules.

27 <sup>2</sup>Because the court finds Linfoot's claims are barred on other  
28 grounds, the court does not reach the defendants' claim preclusion  
and issue preclusion arguments.

1 answered the defendants' Counterclaim at the time they filed their  
 2 motion, he argues the pleadings were not yet "closed," and the  
 3 motion was filed too early and must be dismissed as "incompetent,  
 4 irrelevant and immaterial." Dkt. #21, p. 2; see *id.*, pp. 1-2.  
 5 Linfoot's argument is not supported by the record. The defendants'  
 6 motion is based on copies of documents filed in the State Case and  
 7 in Linfoot's bankruptcy case. Therefore, the motion is not based  
 8 solely on the pleadings, and is not brought under Rule 12(c).

9 Linfoot also argues the defendants' motion is brought too soon  
 10 because discovery has not commenced in the case, and even if the  
 11 defendants' motion had merit (which he disputes), they still would  
 12 not be entitled to summary judgment at this early stage. *Id.*, p. 2  
 13 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548,  
 14 91 L. Ed. 2d 265 (1986): "[T]he plain language of Rule 56(c)  
 15 mandates the entry of summary judgment, after adequate time for  
 16 discovery and upon motion against a party who fails to make a  
 17 showing sufficient to establish the existence of an element essen-  
 18 tial to that party's case, and on which that party will bear the  
 19 burden of proof at trial." Emphasis by Linfoot.). Even if the  
 20 court, viewing Linfoot's *pro se* response liberally, deemed  
 21 Linfoot's argument as a request for discovery under Rule 56(d), the  
 22 motion should be denied as futile. There are no facts Linfoot  
 23 could develop through discovery that would change the outcome of  
 24 the defendants' motion for summary judgment.

#### 25 26 **A. FDCPA and OUDCPA Claims**

27 Linfoot claims the defendants violated the FDCPA and OUDCPA in  
 28 the following ways:

7 - FINDINGS AND RECOMMENDATION

1           1)     The defendants failed to verify the debt upon Linfoot's  
 2 request, which "invalidated" the defendants' right "to continue  
 3 collection activities - including litigation - until and unless  
 4 they had provided the verification demanded by [Linfoot]." Dkt.  
 5 #2, ¶ 28.

6           2)     Until the defendants complied with his request by vali-  
 7 dating the debt, the defendants "were legally required to cease all  
 8 communications with [Linfoot]." *Id.*, ¶ 29. Thus, when the  
 9 defendants filed their motion for authorization of a Sheriff's sale  
 10 of Linfoot's real property, in November 2011, and then mailed  
 11 Linfoot a copy of that motion, they violated the FDCPA's  
 12 "proscription . . . against sending communications without prior  
 13 validation and after notification of the request for validation."  
 14 *Id.*, ¶ 30 (citing 15 U.S.C. §§ 1692g(b)<sup>3</sup>, 1692c(c)<sup>4</sup>).

15           3)     The defendants' mailing of the motion for default and  
 16 motion for Sheriff's sale were "false and misleading"

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17  
 18  
 19  
 20           <sup>3</sup>The statute provides, in pertinent part, that when a consumer  
 21 timely "requests the name and address of the original creditor, the  
 22 debt collector shall cease collection of the debt, or any disputed  
 23 portion thereof, until the debt collector obtains verification of  
 the debt or a copy of a judgment, or the name and address of the  
 original creditor," and mails the same to the consumer. 15 U.S.C.  
 § 1692g(b).

24           <sup>4</sup>The statute requires a debt collector to cease most types of  
 25 further communications with a consumer who "notifies [the] debt  
 26 collector in writing that the consumer refuses to pay a debt or  
 27 that the consumer wishes the debt collector to cease further  
 28 communication with the consumer[.]" 15 U.S.C. § 1692c(c).  
 Notably, in this case, Linfoot's letter to Bernardi & Spencer *did*  
 not ask them not to communicate with him further, and specifically  
 stated, "This is not a refusal to pay, but a notice that your claim  
 is disputed." Dkt. #2, Ex. 1.

1 representations in violation of 15 U.S.C. § 1692e(5)<sup>5</sup>, "to take an  
 2 action, to wit, enforcement of a default judgment which was granted  
 3 without prior service of the summons and complaint, that cannot  
 4 legally be taken." Dkt. #2, ¶¶ 32, 34.

5 4) The defendants' mailing of the "Motion for default" and  
 6 the motion for Sheriff's sale violated 15 U.S.C. § 1692e(9)<sup>6</sup> "in  
 7 that it simulated lawful process of a court of the State of Oregon,  
 8 creating a false impression as to its authorization." Dkt. #2,  
 9 ¶¶ 33, 35.

10 Thus, Linfoot's claims arise from his allegation that the  
 11 defendants failed to validate the debt upon request, and then  
 12 continued to communicate with him regarding the debt by mailing  
 13 copies of motions in the State Case, without providing the  
 14 requested validation. He also alleges the defendants fraudulently  
 15 represented to the State court that he had been properly served  
 16 with process in the State Case.

17 The FDCPA specifies that claims must be brought "within one  
 18 year from the date on which the violation occurs." 15 U.S.C.  
 19 § 1692k(d). The Ninth Circuit has held that a "discovery rule"  
 20 applies to cases under the FDCPA, meaning the "limitations period  
 21 begins to run when the plaintiff knows or has reason to know of the  
 22

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23 <sup>5</sup>The statute prohibits a debt collector from using "false,  
 24 deceptive, or misleading representation[s] or means in connection  
 25 with the collection of any debt," including a "threat to take any  
 action that cannot legally be taken. . . ." 15 U.S.C. § 1692e(5).

26 <sup>6</sup>Subsection (9) prohibits "[t]he use or distribution of any  
 27 written communication which simulates or is falsely represented to  
 28 be a document authorized, issued, or approved by any court, offi-  
 cial, or agency of the United States or any State, or which creates  
 a false impression as to its source, authorization, or approval."  
 15 U.S.C. § 1692e(9).

1 injury which is the basis of the action." *Mangum v. Action*  
2 *Collection Serv., Inc.*, 575 F.3d 935, 940 (9th Cir. 2009) (internal  
3 quotation marks, citations omitted); accord *Townsend v. Chase Bank*  
4 *USA, N.A.*, 445 Fed. Appx. 920, 921 (quoting *Mangum*). There is no  
5 question that Linfoot knew of the judgment he seeks to attack here  
6 by, at the latest, the date he listed the judgment on his  
7 bankruptcy schedules; i.e., November 24, 2009. Thus, Linfoot's  
8 failure to bring his FDCPA claim prior to November 24, 2010, is  
9 fatal to his FDCPA claim in this case.

10 The OUDCPA similarly specifies a one-year limitation period  
11 for commencement of an action. ORS § 646.641(3). The Oregon Court  
12 of Appeals has explained that the limitations period does not begin  
13 to run until the debt collector employs a prohibited collection  
14 practice. *Bennett v. Reliable Credit Ass'n, Inc.*, 125 Or. App.  
15 531, 534, 865 P.2d 496, 498 (1993). Linfoot argues the defendants'  
16 ongoing efforts to collect the debt in the State Case constitute  
17 continuing, separate violations of the FDCPA and OUDCPA, and  
18 because OCI obtained the order authorizing sale of Linfoot's  
19 residence in May 2012, he claims this action is timely.

20 Although some courts, interpreting the FDCPA, have recognized  
21 a "continuing violation theory," under which "each new communica-  
22 tion begins a fresh statute of limitations period for the claim,"  
23 *Nutter v. Messerli & Kramer, P.A.*, 500 F. Supp. 2d 1219, 1223 (D.  
24 Minn. 2007) (citing *Sierra v. Foster & Garbus*, 48 F. Supp. 2d 393,  
25 395 (S.D.N.Y. 1999)), subsequent communications regarding an  
26 existing claim do not "start a fresh statute of limitations  
27 period." *Reese v. JPMorgan Chase & Co.*, 686 F. Supp. 2d 1291, 1307  
28 (S.D. Fla. 2009) (citing *Nutter*; in turn citing, *inter alia*, *Campos*

1 *v. Brooksbank*, 120 F. Supp. 2d 1271, 1274 (D.N.M. 2000)). The  
 2 court finds similar reasoning persuasive with regard to the OUDCPA.  
 3 Furthermore, the court finds that mailing Linfoot copies of  
 4 documents filed in the State Case were not "communications" with  
 5 him constituting violations of either the federal or the state act.  
 6 The Oregon Rules of Civil Procedure required OCI to serve a copy of  
 7 its motions on Linfoot. See ORCP 90(A). Cf. *Naas v. Stolman*, 130  
 8 F.3d 892, 893 (9th Cir. 1997) (holding, in circumstances where  
 9 alleged violation of FDCPA involved the filing of a lawsuit in  
 10 state court, that statute of limitations began to run on the date  
 11 the complaint was filed).

12 For these reasons, the court finds Linfoot's claims under the  
 13 FDCPA and OUDCPA are time-barred, and the defendants' motion for  
 14 summary judgment on those claims should be granted.

#### 16 **B. Declaratory Judgment Claim**

17 In this claim, Linfoot asserts the defendants procured the  
 18 default judgment in the State Case "by illegal actions . . . [and]  
 19 intrinsic fraud and in violation of the Fourteenth Amendment right  
 20 to due process in the form of notice and an opportunity to be heard  
 21 before being deprived of property[.]" Dkt. #2, ¶ 41. He seeks a  
 22 declaratory judgment that the judgment against him in the State  
 23 Case is "void and unenforceable, and may not be made the basis of  
 24 any lien on real or personal property, or in any other fashion  
 25 provide the basis of any legal obligation enforceable against  
 26 [Linfoot]." *Id.*, ¶ 42.

27 The defendants argue this claim is barred because it is merely  
 28 "'creative labelling - styling [the] action as one for declaratory

1 relief rather than for damages.'" Dkt. #15, p. 4 (quoting *Levald,*  
 2 *Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)).  
 3 The defendants assert that the same statutes of limitations  
 4 applicable to Linfoot's FDCPA and OUDCPA claims also apply to his  
 5 declaratory judgment claim. *Id.* (citations omitted).

6 The "general rule" under Oregon law holds "that when declara-  
 7 tory relief is sought as an alternative to other appropriate and  
 8 otherwise available relief, the relevant limitations period for the  
 9 declaratory judgment suit should be based on that of the underlying  
 10 grounds for relief." *Brooks v. Dierker*, 275 Or. 619, 623, 552 P.2d  
 11 533, 535 (1976). Accordingly, because Linfoot's claims are barred  
 12 by the statutes of limitation governing the FDCPA and OUDCPA, his  
 13 claim for declaratory relief also would be barred on statute of  
 14 limitations grounds, to the extent the claim "is sought as an  
 15 alternative to other appropriate and otherwise available relief."  
 16 *Id.* However, Linfoot does not assert his claim for declaratory  
 17 relief in the alternative, nor is that claim based on any alleged  
 18 violation of the federal and state debt collection statutes.  
 19 Rather, he seeks to invalidate and render unenforceable the  
 20 judgment of the State court in the State Case.

21 Linfoot's claim for declaratory relief is barred pursuant to  
 22 the *Rooker-Feldman* doctrine, which the court has described as  
 23 follows:

24           The *Rooker-Feldman* doctrine takes its  
 25           name from *Rooker v. Fidelity Trust Co.*, 263  
 26           U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362  
 27           (1923)[,] and *District of Columbia Court of*  
 28           *Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct.  
               1303, 75 L. Ed. 2d 206 (1983). . . .

              The doctrine holds that a United states  
 district court is precluded from exercising

subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority (e.g., federal question, diversity), when the losing party in state court files suit in federal court after the state proceedings end, complaining of an injury caused by the state court judgment and seeking review and rejection of that judgment. . . . The doctrine applies regardless of whether the state court proceeding afforded the federal court plaintiff a full and fair opportunity to litigate his claims. . . . [T]his jurisdictional bar extends to claims that are "inextricably intertwined" with those the state court has already decided.

*Brooks v. Vinci*, 2010 WL 3607778, at \*2 (D. Or. July 29, 2010) (Hubel, MJ) (citations omitted).

The *Rooker-Feldman* doctrine precludes this court from exercising subject-matter jurisdiction over Linfoot's declaratory judgment claim, in which he seeks "review and rejection" of the judgment against him in the State Case. *Id.* Thus, the defendants' motion for summary judgment should be granted on this claim.

### **C. Tort Claim**

Linfoot also asserts a claim for intentional infliction of emotional distress ("IIED"). An IIED claim must "be commenced within two years" of the alleged injury. ORS § 12.110(1). Where the injury is "based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit." *Id.*

Even assuming, *arguendo*, that Linfoot could show the default judgment in the State Case was procured through fraud, the "discovery rule" for claims based on fraud that is embodied in ORS § 12.110(1) would require that he bring his claim within two years.

1 As noted above, Linfoot knew of the judgment against him in the  
2 State Case no later than the date he listed the judgment on his  
3 bankruptcy schedules; i.e., November 24, 2009. Therefore, his  
4 failure to file suit by November 24, 2011, is fatal to this claim.

5 Moreover, the court also is precluded from exercising subject-  
6 matter jurisdiction over Linfoot's IIED claim by the *Rooker-Feldman*  
7 doctrine, discussed above. In order to find that Linfoot was  
8 injured by the "Defendants' wrongful, illegal and wilful actions"  
9 in the State Case, as Linfoot alleges, Dkt. #2, ¶ 52, the court  
10 necessarily would be required to find the judgment in the State  
11 Case was procured by fraud - in effect, "review and rejection" of  
12 the judgment in the State Case.

13 Thus, Linfoot's IIED claim is barred both on statute-of-  
14 limitations grounds and by the *Rooker-Feldman* doctrine, and the  
15 defendants' motion for summary judgment on this claim should be  
16 granted.

### 17 18 **CONCLUSION**

19 For the reasons discussed above, I recommend the defendants'  
20 motion for summary judgment be **granted** as to all of Linfoot's  
21 claims.

### 22 23 **SCHEDULING ORDER**

24 These Findings and Recommendation will be referred to a  
25 district judge. Objections, if any, are due by **February 11, 2013**.  
26 If no objections are filed, then the Findings and Recommendation  
27 will go under advisement on that date. If objections are filed,  
28 then any response is due by **February 28, 2013**. By the earlier of

1 the response due date or the date a response is filed, the Findings  
2 and Recommendations will go under advisement.

3 IT IS SO ORDERED.

4 Dated this 23rd day of January, 2013.

5  
6 /s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge